

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE #5**

and

CITY OF PHILADELPHIA

**AAA Case #01-17-0003-1486
(Gr: P/O T. Forest Discharge)**

Walt De Treux, Esq., Arbitrator

Hearing Date: 7/31/18

Decision Date: 9/14/18

Appearances: For the FOP – Richard G. Poulson, Esq., *WILLIG WILLIAMS*
For the City – Kia Ghee, Esq., *OFFICE OF THE CITY SOLICITOR*

Introduction and Statement of Relevant Facts

During late morning January 31, 2017, Tony Forest, a 3-year Philadelphia Police Officer assigned to the 14th District, worked out at a gym on the grounds of the Naval Supply Depot in Northeast Philadelphia. Scheduled to report for his shift later that day, Officer Forest left the gym with a fellow officer, S [REDACTED] M [REDACTED], to go to a police uniform store. Driving his white Mercedes-Benz, Officer Forest, heading eastbound on Cottman Avenue, stopped at a red light at the intersection of Cottman and Whitaker Avenues, just west of the block-long Jardel Recreation Center. When the light turned green, Officer Forest accelerated quickly, soon reaching 63 mph before reaching the next intersection.

24th District Police Officer A [REDACTED] S [REDACTED] had worked out at the same gym and left around the same time as Officers Forest and M [REDACTED]. He stopped his silver Subaru at the red light at the same intersection in the right eastbound lane alongside Officer Forest's car. He

also accelerated quickly when the light turned green, initially trailing Officer Forest's car before reaching 75 mph immediately prior to the next intersection at Cottman Avenue and Pennway Street.

As S ■ passed Officer Forest at the Pennway Street intersection, Officer Forest decelerated. S ■ was well ahead of Officer Forest when he passed through the intersection of Cottman and Algon Avenues at 85 mph. Officer Forest had slowed to 45 mph by the time he reached that same intersection.

As S ■ sped down Cottman Avenue, a pedestrian, D ■ D ■, was crossing Cottman Avenue mid-block east of the Algon Avenue intersection and in front of Northeast High School. Officer S ■'s vehicle struck D ■, throwing him approximately 144 feet to the south side curb. D ■ died from his injuries.

The Department's Internal Affairs Division (IAD) conducted an investigation, interviewing approximately 30 witnesses, reviewing videotape obtained from local businesses, and obtaining expert analysis from the Accident Investigation Division (AID). The matter was referred to the District Attorney's office. S ■ was arrested on April 26, 2017 and charged with Involuntary Manslaughter and Homicide by Vehicle. Officer Forest was not criminally charged. He was issued citations for violations of the Motor Vehicle Code (Speeding and Driving at a Safe Speed).

On April 26, 2017, Philadelphia Police Commissioner Richard Ross suspended Officers S ■ and Forest for 30 days with the intent to dismiss, effectively terminating their employment. Officer Forest, terminated for Conduct Unbecoming, timely grieved his discharge. The parties were unable to resolve the grievance through the contractual steps, and the matter

was referred to arbitration. On July 31, 2017, a hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties concluded their presentations with oral argument, and the matter was submitted to the Arbitrator for a decision.

Issue

The parties stipulated to the following issue,

Did the City of Philadelphia have just cause to discharge Officer Tony Forest? If not, what shall be the remedy?

Analysis and Decision

The events of January 31, 2017 were tragic, ending with the death of D ■■■ D ■■■ and costing Officer S ■■■ his professional career and possibly his freedom. Arguing in support of the decision to terminate Officer Forest, the City is alleging that he contributed to the horrific accident by driving at a high rate of speed on a busy city street and engaging S ■■■ in a drag race.

At hearing, the City cited to Police Directive 144 which governs “Off-Duty Police Actions” as a basis for termination. The City’s reliance on this Directive is confusing and misplaced. The Directive relates to police action taken by off-duty police officers, i.e., when an off-duty officer involves himself in a police matter. It does not address off-duty misconduct

unrelated to police matters. The Statement of Charges Filed against Officer Forest on April 26, 2017 (the day of his 30-day suspension with intent to dismiss) does not cite to Police Directive 144. It charges Officer Forest with violation of Article I, Section 1-§021-10 of the Philadelphia Police Department Disciplinary Code. That section addresses Conduct Unbecoming and reads in full,

“Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.

Although Commissioner Richard Ross mentioned Police Directive 144 in his arbitration testimony, he couched his explanation of the reasons for discharge in the terms of Section 1-§021-10. Commissioner Ross was straightforward as to the reasons he decided to take direct action to terminate Officer Foster. He testified that Grievant was reckless for engaging in drag racing. He found it “reprehensible” to be drag racing on Cottman Avenue at 11:30a with schools, a rec center, stores, houses, and people all nearby. He further found fault in Grievant’s failure to render aid to D [REDACTED] after the accident. He emphasized that Grievant’s conduct while drag racing and his post-crash conduct in not rendering aid were inconsistent with the duties of Philadelphia police officer.

Commissioner Ross’ decision to terminate rests on his conclusion that Officer Forest was drag racing. That conclusion does not square with the conclusions reached by the Internal Affairs investigation, the analysis by the Accident Investigation Unit, the determination of the District Attorney’s Office, or the evidence presented at hearing.

In the conclusion section of the IAD investigative report, there is no reference to drag racing. It cites to both S [REDACTED] and the Grievant’s vehicle “being operated at a high-rate of speed,” but it does not characterize the officers’ conduct as drag racing. IAD found sufficient evidence

to charge S [REDACTED] with Involuntary Manslaughter and Homicide by Vehicle. Although the City argued at hearing that Officer Forest's actions contributed to the accident, IAD and the District Attorney's Office declined to press the same charges against him. Rather, it cited him for two violations of the Motor Vehicle Code – Driving at a Safe Speed and Speeding.

Similarly, the District Attorney's Office issued a letter on June 2, 2017 regarding the investigation "into the speeding done by P/O Tony Forest." It confirms that in exchange for Grievant pleading guilty to and not contesting the speeding citations, the DA agrees to "not charge Mr. Forest with any violations of the criminal vehicle code."

In the Statement of Charges Filed that led to Grievant's termination, drag racing is not mentioned. While it references "[b]oth vehicles...travelling side by side at a high rate of speed," it declines to label the conduct as drag racing.

The conclusions of IAD and DA are based on evidence, the same evidence presented at hearing. The only eyewitness to the incident from start to finish was A [REDACTED] J [REDACTED], a motorist stopped behind S [REDACTED] at the intersection of Cottman and Whitaker Avenues. She was interviewed at the scene of the accident. She explained to the AID investigator that the cars were speeding. The investigator asked, "Did it appear that the Subaru + Mercedes were racing?" She replied, "Not racing, they were both driving fast."

In her Internal Affairs interview, J [REDACTED] stated that both cars "look like they were racing," explaining that they both took off from the red light at a high rate of speed. At the arbitration hearing, however, she made no claim that they were racing. She testified that they were "speeding down the street" and "flying down the street."

J■■■■'s testimony at hearing, combined with the inconsistency of her statements to the AID and Internal Affairs investigators, is insufficient to demonstrate that the officers were drag racing.

It is the high quality work of the Accident Investigation Division that dispels the notion that Grievant was drag racing with S■■■■. Officer William Lackman reviewed videos that captured the vehicles across three blocks of Cottman Avenue (1400-1600 blocks) through the accident scene. He was able to reconstruct the sequence of events that led to D■■■■'s death.

Officer Lackman found that both cars were stopped at the red light at Cottman and Whitaker Avenues. When the light turned green, both vehicles accelerated quickly. As they traveled east on Cottman Avenue toward the Pennway Street intersection, Grievant's car was ahead of S■■■■'s car. Grievant reached a top speed of 63 mph on the 1400 block of Cottman Avenue before decelerating to 60 mph as he crossed through the intersection. S■■■■ sped up, reaching 75 mph as he entered the intersection and passed Grievant's car. Through the 1500 block of Cottman Avenue (Pennway Street to Algon Avenue), S■■■■ continued to increase his speed, hitting 85 mph and timing the light at the Algon Avenue intersection so that he did not stop as the light turned from red to green. Grievant continued his deceleration through the 1500 block, slowing to 45 mph about 150 feet prior to the Algon Avenue intersection. After S■■■■'s car struck D■■■■ approximately midway on the 1600 block of Cottman Avenue, S■■■■ pulled over and exited his car. 23 seconds later, Grievant's car came up to the accident scene. Grievant pulled over in the middle of the street and exited his vehicle. J■■■■'s vehicle pulled behind Grievant several seconds later.

Officer Forest denied drag racing with S█. He explained that he knew S█ to say hello, but had no other relationship with him. He saw him at the gym on January 31, 2017, but did not see S█ leave the gym and had no discussion with him. Stopped at the intersection of Cottman and Whitaker Avenues, Grievant saw that all the lights ahead of him for a few blocks were green. He admittedly accelerated quickly from the stopped position. He did not notice the car next to him until it drove alongside him for a brief period before passing him. He did not know that it was S█ driving the car. From the passenger seat, Officer M█ first saw the pedestrian crossing the street a block or more ahead of them and realized the car was going to strike the pedestrian. Grievant pulled his vehicle over at the accident scene.

Officer Lackman's accident reconstruction supports Officer Forest's account. Officer Forest was speeding recklessly (up to 63 mph) on the 1400 block of Cottman Avenue. His car was ahead of S█'s car. There is no conclusive evidence that he was racing S█ at that point. Grievant claims he did not realize the car next to him had also accelerated quickly when the light at the Whitaker Avenue intersection turned green. Grievant first noticed the car as it pulled alongside of him on the east half of the 1400 block near the Pennway Street intersection. It is at that point that he began slowing down – exactly the opposite action expected if he was racing. He may have slowed because the light at the Algon Avenue intersection one block away was red; but whatever the reason, his decrease in speed counters the City's theory at hearing that he was drag racing. It supports the conclusion that Officer Forest recklessly sped down the 1400 block of Cottman Avenue. Maybe he would have continued to do so if the traffic lights ahead of him stayed green, but Officer Lackman's analysis limits Grievant's reckless speeding, i.e., driving twice the speed limit on a busy city street, to that one block of Cottman Avenue, 1-

1/2 blocks from the accident scene. Whether or not S■■ tried to provoke a race with Grievant, Grievant's driving, as demonstrated through the multiple videos and AID analysis, showed that he did not follow S■■'s lead. Rather, after a block of driving needlessly fast, he slowed his car, and S■■ pulled out well ahead of him. As noted, after S■■ struck D■■, Grievant arrived on scene a full 23 seconds later. At least 1-1/2 blocks prior to the accident, S■■ was ramping up his speed as Grievant was decelerating.

For these reasons, I find that the evidence does not support the City's argument that Grievant was drag racing.¹ As that was the primary reason Commissioner Ross discharged Officer Forest, I find that discharge is not an appropriate penalty.²

Discipline, however, is warranted. As the Commissioner explained, it was inconsistent with Grievant's responsibility as a police officer for him to ignore the stores, businesses, schools, recreation centers, other motorists, and pedestrians on a busy city street on a late weekday morning and travel twice the speed limit solely because he saw all green lights for a few blocks ahead of him. His conduct was irresponsible, thoughtless, careless, and reckless. His driving posed a safety risk for himself and for the other people on Cottman Avenue that day. The City properly charged Grievant with Conduct Unbecoming.

¹ In reaching an agreement with the District Attorney's Office, Grievant had to agree not to challenge the citations that were issued. Those citations referred to engaging in "a contest of speed." As noted, that conclusion was not reached by Internal Affairs or the District Attorney, and Grievant had no opportunity to litigate that issue in Municipal Court. Grievant's guilty plea to the citations under these circumstances cannot be considered an admission to drag racing.

² Commissioner Ross also cited to Grievant's alleged failure to render aid to the victim as a reason for discharge. That allegation is not mentioned at all in the Internal Affairs report or the Statement of Charges Filed and cannot be raised for the first time at the arbitration hearing to bolster the termination decision. Moreover, the video shows Grievant exit his car at the accident scene, cross the eastbound lanes of Cottman Avenue, and walk toward D■■ (and away from S■■). When Grievant approaches to within several feet of the victim, an ambulance pulls up and emergency medical personnel go to D■■'s aid. Grievant lingers for a few seconds before turning away. Grievant did not render aid because emergency personnel arrived at the victim's side at the same time as Grievant.

The FOP argues that police officers do not get harshly disciplined, much less discharged, for speeding. The Commissioner admitted that speeding offenses would not normally reach his desk. But as the Commissioner recognized, this case is not a speeding ticket case. Even absent S■■■■'s conduct and the tragic aftermath, Grievant's blatant disregard for his surroundings and his reckless indifference to his own safety and the safety of others, no matter that he was off-duty, call into question his appreciation and respect for the responsibility he has as a police officer.

As the City based the decision to terminate on the conclusion that he was drag racing and that he contributed to the accident, allegations unsupported by the City's own evidence, discipline is too harsh a penalty for Grievant's actions. The Disciplinary Code provides a penalty range for Conduct Unbecoming from 30 days' suspension to dismissal. Under all the circumstances, a 30-day suspension is an appropriate disciplinary penalty.

For all these reasons, I find that the City have just cause to discipline, but not discharge, Officer Tony Forest.

Award and Remedy

The grievance is sustained in part and denied in part. The City had just cause to discipline, but not discharge, Officer Tony Forest. As remedy, the City is directed to reduce Grievant's discharge to a 30-day suspension and to reinstate him to his former position without loss of seniority. The City is further directed to make Grievant whole for any losses incurred by the discharge, including but not limited to, back pay and benefits for the period from the date of his discharge to the date of his reinstatement, less the 30-day suspension period and any interim earnings.

The Arbitrator shall retain jurisdiction of this case for the sole purpose of resolving any disputes over implementation of the remedy.



WALT De TREUX